1986

The State of Utah v. Patrick D. Johnson : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent	:	
vs.	:	
PATRICK D. JOHNSON,	:	Case No. 20814
Defendant/Appellant	:	

BRIEF OF APPELLANT

Appeal from a conviction and judgment of Burglary, a Third Degree Felony, and Forgery, a Second Degree Felony, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Judith M. Billings, Judge, presiding.

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STATEMENT OF THE CASE

This is an appeal from a judgment against Patrick D. Johnson for Burglary, a Third Degree Felony, in violation of Utah Code Ann. §76-6-202 (1953 as amended), and Forgery, a Second Degree Felony, in violation of Utah Code Ann. §76-6-501 (1953 as amended). A jury found him guilty following a trial on May 29-30, 1985 in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Judith M. Billings, Judge, presiding. He was sentenced to the indeterminate terms of not more than five years for Burglary, and one to fifteen years for the Forgery, the sentences to run consecutively at the Utah State Prison beginning July 1, 1985.

Statement of Facts

Prior to trial, defense counsel filed three motions: 1) a motion to sever seven counts of forgery from one count of burglary and one count of forgery alleged in the information;

2) a motion to suppress evidence obtained during an improper parole search of the defendant's residence; and 3) a motion to exclude from trial the other crimes testimony of one of the State's witnesses (R.10,13,25). (Addendum A) The court granted the first motion but denied the other two (R.10,26,144,164). (Addendum B)

During trial, and at the hearing on the motion to suppress, the following facts were adduced. At approximately 10:00 a.m. on February 2, 1985 Harry Deckert, Pastor of the Four Square Church located at 1068 Jefferson Street, discovered that his church had been broken into and that a tape recorder was missing from the premises (T.14-19). On further investigation, Pastor Decket found what appeared to be blood stains on two shattered windows, on the floor of the church and on the door handle of the church's main door (T.18). It was stipulated at trial that police officer Tom Olsen responded to Mr. Deckert's report of the burglary; Officer Olsen investigated the scene and concluded that none of the surfaces inside or outside the church could be processed for fingerprints (T.27). No blood samples were taken into evidence (T.27). No one was seen in or around the church by either Pastor Deckert or Officer Olsen (T.17).

After the police investigation, Pastor Deckert found that two groups of checks were missing from two different Four Square Church checkbooks kept in his office desk (T.19). Thirty-five checks, numbered 1175-1210, were missing from the "light-blue" church checking account, and 86 checks, numbered 2444-2530, were

missing from the other set of checks colored "yellow" (T.19). Two State's exhibits S-1 (a blue Four Square Church check, No. 1180) and S-10 (a yellow church check, No. 2246[sic]) were identified by Mr. Deckert as two of the missing checks; Pastor Deckert testified that he had not issued the checks and that he had not given anyone authority to handle or issue the checks on behalf of Four Square Church (T.21). Pastor Deckert further testified that he did not know anyone named Cary Montoya or Gary G. Montoya (T.21).

At approximately 6:00 p.m. on February 2, 1985, Four Square Church check No. 1180 was cashed at Macey's supermarket located on 1406 West 10th North. Lynn Cevering, a Macey's employee, testified that he cashed the check for a black male who represented himself as Cary Montoya (T.32). According to Mr. Cevering, the individual claiming to be Cary Montoya presented two forms of identification--neither I.D. displayed a picture--and endorsed the check in Mr. Cevering's presence (T.31). On February 12th a police detective showed Mr. Cevering a photo spread containing five or six pictures and asked him to pick out the individual who had endorsed the Four Square Church check (T.33). Mr. Cevering selected the appellant's Patrick Johnson's, picture and wrote on the back of it that he was "70 percent" certain this was the individual who had endorsed check No. 1180 (T.35). However, on April 29, at a physical lineup which took place at the Metropolitan Hall of Justice, Mr. Cevering was unable to identify Patrick Johnson as the individual who had claimed to be Cary Montoya back on

February 2 (T.37). In fact, Mr. Cevering indicated on his lineup instruction card that he "felt" someone other than the defendant was posibly the individual who had endorsed the check (T.37-38).

Over defense counsel's numerous objections (including the denied 404(b) motion to exclude other crimes evidence), Nora Welch testified for the State. Ms. Welch, an employee at Stimson's supermarket located at 158 West 600 North, stated that she accepted a check for groceries and cash written on the account of Cary Montoya on February 2nd around 4:00 p.m. (T.46-49). She testified that she had cashed checks for the individual purporting to be Cary Montoya on more than one occasion (T.50). On February 11th, Ms. Welch was shown a photo spread by a police detective and she positively identified the defendant as being the individual who cashed the Cary Montoya check (T.52-53). On March 5th, Ms. Welch selected the appellant from an eight-man lineup at the Metropolitan Hall of Justice, again, as being the individual who cashed the Cary Montoya check (T.55). Ms. Welch also testified that she told a police officer, sometime after February 2nd but before February 11th, that the individual who presented himself as Cary Montoya on February 2nd had a "mustache and a little beard" (T.62). In neither the photos, nor in the lineup did the defendant have a mustache and little beard.

Cary Montoya testified at trial that he had not signed the February 2nd check, that he had given no one the authority to do so and that the last time he had seen his checkbook on November 17, 1984, it was in the hands of his landlady (T.64-67).

In November of 1984 Mr. Montoya's landlady evicted him; she claimed she would turn his checkbook over to his bank but she apparently never did (T.66).

At trial, police crime lab technician, Steve Rowley, made a detailed comparison of the endorsement on the Four Square Church check and the signature on the check from the account of Cary Montoya (T.82-98). Mr. Rowley stated he was 90-95 per cent sure the two checks had been signed by the same person (T.98).

Salt Lake Detective Kyle Jones testified that he met with the appellant's two parole officers, John Shepard and Rick Acevedo, on February 13, 1985 and informed them that he had obtained a warrant for the arrest of Patrick Johnson for eight counts of forgery (R.181). Detective Jones told Mr. Shepard and Mr. Acevedo that the forgeries involved the Four Square Church and Cary Montoya checking accounts (T.197). Agents Acevedo and Shepard decided, based on this information and on the suspicion that the defendant had pawned a stereo on January 9th, that Mr. Shepard should conduct a parole search of appellant's premises (R.192).

On February 14, 1985 the appellant was residing with his mother, Connie Morashita, at 1861 West 600 North (T.69). John Shepard testified at trial, and at the pretrial hearing on the defense's motion to suppress, that he went to the appellant's residence around 2:00 p.m. on February 14th accompanied by Salt Lake City Detectives Kyle Jones and Jim Bell, Sargeant Mike Roberts and Lieutenant Brent Davis (T.69)(R.183). Mr. Shepard

stated that the police went to the residence to arrest the appellant for forgery and that he (Mr. Shepard) went to the appellant's residence to conduct a parole search based on reasonable suspicion that the appellant had violated the terms of his parole (R.192). The record does not clearly indicate whether the police asked Mr. Shepard to accompany them to the residence (R.206,210). Once Agent Shepard and the police had arrived at the appellant's residence they remained out of sight while Agent Acevedo phoned the appellant to make sure he was in the apartment; Mr. Acevedo then radioed the police and informed them that the appellant was at home (R.206). After the four officers and Agent Shepard had gained entrance to Mrs. Morashita's apartment--with her consent--the police placed the appellant under arrest (R.208). Mr. Shepard then conducted a parole search of the apartment (R.208). It is unclear whether Mrs. Morishita gave permission for such a search. She testified she did not (R.218).

Agent Shepard testified that he was specifically searching for Four Square Church checks (R.16) and that this is what he told Mrs. Morashita when he purportedly gained her consent to search (R.208).

Mr. Shepard found a black binder in the apartment's front hall closet. He immediately confiscated the binder and its contents, terminated his parole search and turned the material over to the police while still inside the apartment (R.187-189). The binder contained: a Four Square Church check, a VISA credit card receipt signed "Cary Montoya," a VISA credit card receipt

to the Pawn Shop signed "Cary Montoya," a VISA credit card receipt to Thrifty Drugs signed "Cary Montoya," a Traveler's Express Purchase receipt signed "Willie Johnson," three photographs of the appellant and a photograph of another man--not the appellant (T.71-81).

Connie Morashita's stipulated testimony indicated that her other son, Lonnie Johnson, was also living with her at the time of the appellant's arrest (T.127).

On the last day of trial, defense counsel took exception to the court's decision to give the jury a possession of recently stolen property instruction (T.124). The jury convicted the appellant of the offenses of Burglary, a Third Degree Felony (based on the application of Utah's property recently stolen statute, Utah Code Ann. §76-6-402 (1953 as amended), and Forgery, a Second Degree Felony (T.130).

SUMMARY OF ARGUMENTS

The first argument on appeal is that the trial erred in failing to suppress evidence obtained during an illegal parole search of the appellant's residence. The parole search conducted by John Shepard, the appellant's parole officer, was instigated by the police. Furthermore, the search was not conducted pursuant to Mr. Shepard's duties as a parole agent, but was carried out for the primary purpose of uncovering evidence with which to secure burglary and forgery convictions against the appellant.

The second argument on appeal is that the court below committed reversible error by failing to exclude other crimes

evidence which was not probative on any issue at trial. After granting the appellant's motion to sever various counts of forgery, the trial court erred by allowing testimony concerning one of the severed counts into trial. These gravely inconsistent rulings permitted the State to present the jury with nothing more than cumulative evidence of the appellant's propensity to commit crime.

The third argument on appeal is that the trial court committed a fundamental error when it read the jury an unconstitutional "possession of property recently stolen" instruction. Because this instruction contained a mandatory rebuttable presumption, it relieved the State of its burden of proof. The instruction severely abridged the appellant's right to be presummed innocent until proven guilty.

ARGUMENTS

POINT I

THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED DURING AN IMPROPER PAROLE SEARCH.

On the day prior to Patrick Johnson's arrest on eight counts of forgery, Detective Kyle Jones met with the appellant's parole officers, John Shepard and Rick Acevedo (R.181). Detective Jones informed the two officers of his intent to arrest the appellant (R.18). He fully explained the basis for the issuance of a warrant for the appellant's arrest (R.197), and he indicated his belief that certain stolen checks were probably still in the

appellant's possession (R.181). After this meeting, Agents Shepard and Acevedo decided that one of them should accompany the arresting police officers to the appellant's residence in order to determine the nature and extent of Mr. Johnson's parole violation (R.192).

On the day of the appellant's arrest, Mr. Shepard and four police officers gained entry to the appellant's mother's (Mrs. Morashita's) apartment--where the appellant was residing--via Mrs. Morashita's consent (R.208). After the appellant was arrrested, Mr. Shepard conducted a search of the apartment (R.208). In one of the apartment's closets Agent Shepard found a black binder containing a Four Square Church check and numerous receipts bearing the signature "Cary Montoya" (R.187). Mr. Shepard immediately turned over the binder and its contents to the officers present in the apartment and terminated his search (R.187-189).

Prior to trial, the appellant made a motion to suppress the evidence obtained during Agent Shepard's parole search (R.13). (Addendum A) The appellant argued to the court below that the parole search was not conducted pursuant to Mr. Shepard's proper duties as a parole officer (R.55-56). It was, and is, the appellant's contention that the parole search was carried out for the purpose of uncovering evidence with which to secure burglary and forgery convictions against the appellant (R.56). The court below denied the motion to suppress (R.237-241). (Addendum B) In doing so, the court reasoned:

> The state must persuade this court. . . that the search was reasonably related

to the parole officer's duty. And I believe this is the point that is pressed by counsel for the defendant. She would argue that becuase it was obvious that the defendant would already be taken intc custody that there was no further need for the parole officer to be involved to see whether or not the defendant had committed a crime or violated his parole.

Court is not persuaded by that argument as the court feels that there are two independent and unrelated processes which begin. One is not controlled by the other. When a person is on parole that parole officer may investigate independently of officers, and despite what investigation they may be doing on new offenses, whether, in fact, he has broken the parole agreement. It is this court's duty and the parole officer's duty to independently review that in an order to show cause hearing and, therefore, the court feels that a parole officer has the right and obligation himself to gather evidence for that order to show cause hearing.

The court is persuaded that if there were evidence that this was not the good faith effort on the part of the parole officer to see if there had been a parole violation or a commission of a crime, which is a parole violation, but rather he was being used as a tool of the police rathen than them obtaining what they would have to obtain a search warrant, the court feels the motion would be well taken. However, the court has found no evidence of that in this record and, in fact, would refer to the case [State v. Velasquez, 672 P.2d 1254 (Utah 1983)] cited by counsel for the defendant wherein the court feels the facts in that case were a much worse scenario.

The court cites from page 1257 where it

> states "Voyles told Holm that although the police did not have probable cause for a warrant to search Garcia's apartment, it would be 'beneficial' to the police if the parole department would conduct the search." It seems to me that that is a much clearer case that the police were using the parole department as their agents and yet our supreme court nevertheless upheld the search in that case (R.239-240).

The appellant contends that the court erred in making this ruling. The court's denial of the appellant's motion to suppress illegally obtained evidence abridged the appellant's Due Process privacy protection against unreasonable searches and seizures guaranteed by the Fourth Amendment of the United States Constitution and Article I, Section 14 of the Utah Constitution.

As indicated in the trial court's ruling, the Utah law which articulates the standard for determining the propriety of parole searches is State v. Velasquz, 672 P.2d 1254 (Utah 1983).[1]

Quoting Morrisey v. Brewer, 408 U.S. 471, 481, 99 S.Ct. 2593, 2600, 33 L.Ed. 2d 484, 494 (1972) in Velasquez this court found:

> In formulating a rule to govern parole officer searches, consideration must

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[1] As a threshold inquiry it should be noted that State v. Lesley, 672 P.2d 79 (Utah 1983) (holding that a specific objection at trial is necessary to preserve a claim of error where a pretrial motion to suppress has been denied) does not apply in this case. As the majority noted, their holding is specifically limited to those situations where a defendant does not provide the appellate court with the record of the pretrial hearing so that it can review the pretrial decision. Id., at 82-83. Lesley is also distinguishable from the present case in that Patrick Johnson's trial did not involve the Lesley problem where one district court judge heard the suppression motion and another judge heard the trial.

> be accorded both to "the government function involved" and to "the private interest that has been affected by governmental action."

State v. Velasquez, supra at 1259.

The court stated that the "governmental function involved" is:

> . . . to assist those who have broken the criminal law to make a controlled and supervised transition from prison life--with its intimate and constant association with a society of law-breakers and a high degree of regimentation--to a complete reintegration into society without that kind of association and regimentation. To facilitate that transition, an inmate is permitted parole status subject to conditions designed to maximize the potential for a successful reintegration of the parolee by attempting to ward off some of the undesirable influences that may defeat the purpose of the parole system.

Id. at 1258.

The parolee's "private interest" which is to be balanced against the State's "governmental function" was found to be: ". . . a more narrowly protected privacy interest [than the non-criminal citizen's] designed to facilitate [the parolee's] moving more quickly from the confinement of prison to a point where his full panoply of civil liberties is restored." Id. at 1259.

The court concluded that:

> In dealing with searches of parolee's, we agree with those courts that have adopted what has been called a "middle ground" approach. In determining what constitutes permissible searches and seizures by parole officers, this

> approach, on the one hand, eschews the position that no constitutional protection should be afforded a parolee, but, on the other hand, does not require a warrant based on probable cause. [Citation ommitted.] Thus, although a warrant based on probable cause is not generally required, a parole officer must have reasonable grounds for investigating whether a parolee has violated the terms of his parole or committed a crime. [Citations ommitted.]

Id. at 1260.

The court further concluded that the "reasonable grounds" standard constituted a two-part test of a parole search's validity: ". . . it means a reasonable suspicion that a parolee has committed a parole violation or crime. [Citations ommitted.] The search, however, must also be reasonably related to the parole officer's duty." [Emphasis added.]

Id. at 1260.

Applying this two-part test--involving judicial scrutiny of (1) a parole officer's "reasonable suspicion" that a parole violation has occurred, and (2) the reasonable relationship between the parole search and the duties of a parole officer--to the facts before them, the court in Velasquez denied the defendant's motion to suppress. The defendant in Velasquez argued that because a detective called the parole officer who searched the defendant's residence and told him "it would be 'beneficial' to the police if Adult Probation and Parole" would conduct the search, the probation officer was simply acting as a tool of the police. Velasquez, supra, at 1262. Stating that:

> A parole officer's search of a parolee . . . is not unlawful just because it is also benefficial to the police, or because evidence incriminating the parolee is turned over to the police and used in a criminal prosecution.

Id. at 1263, the court rejected the defendant's contention because "the parole officers had decided that a search should be undertaken even before Detective Voyles [the police officer] talked to Dennis Holm [one of the parole officers]." Id. at 1263. (Emphasis added.)

Because the Utah Supreme Court's ruling in Velasquez turns upon the fact that the parole search in that case was not instigated by the police, the trial court in the present case seriously skewed the language it quoted from Velasquez (see p.10-11 supra) when it quoted that language out of context. Since the court below relied heavily upon this misreading and because there does exist evidence in the record that John Shepard acted as a tool for the police, the court committed serious error when it denied appellant's motion to suppress.

The court below concluded that the facts of Velasquez present a "much worse scenario," i.e., a much clearer indication of a parole officer being used as a tool of the police, than do the facts of State v. Patrick Johnson (R.240). The court based this conclusion on the fact that a police officer in Velasquez asked a parole officer to conduct a search for the benefit of police, while no such request exists in the record of the apellant's trial (R.240). The appellant contends, however, that the

trial court's emphasis of the importance of this distinction led it to entirely overlook the critical basis for the holding in Velasquez: had there been no evidence that the parole officers in that case intended to search before being asked to by the police, and if the officers had in fact searched without that autonomous, prior intent, the court would have found the search illegal.

The record in the present case indicates that John Shepard and Rick Acevedo had sufficient "reasonable suspicion" for conducting a parole search other than their concern that the appellant had burglarized a church and forged checks (R.198). However, their principal independent concerns--that the appellant had pawned a stereo and may have been using drugs--had not led them to conduct a search during the month between the report of the pawning and the day Detective Jones met with them (R.196). The record indicates that it was only after Detective Jones met with the parole agents that the agents decided to conduct the search (R.200-201). Furthermore, at the time of the search, John Shepard explicity stated to Mrs. Morashita that he was searching for stolen checks, and once the checks had been found Agent Shepard immediately turned the seized evidence over to the police and terminated his search (R.187-189). These facts, indicating improper complicity between parole agents and police, should have led the trial court, relying on Velasquez, to conclude that the appellant's constitutional right to be free from unreasonable searches and seizures had been violated.

The appellant does not argue with the contention that:

> The mere fact that [a] police officer was the first to suspect that [the parolee] was engaged in criminal activity and related this to the parole officer--in no way alters the legality of the parole officer's presence [i.e., search].

Velasquez, supra at 1263, nor with the proposition that ". . . to minimize the social risks inherent in parole, an acceptable parole system does necessarily entail a certain degree of close supervision, surveilllance, and control over the parolee." State v. Simms, 516 P.2d 1088 (Wash. App. 1973). Further, the appellant readily admits:

> To evaluate the parolee's progress, and to assist the parolee from avoiding further criminal conduct, the parole officer needs to "have a thorough understanding of the parolee and his environment, including his personal habits, his relationships with other person, and what he is doing both at home and outside it."

Velasquez, supra, at 1259. However, a trial court cannot ignore the dictates of due process which require: ". . .[that] under no circumstances should cooperation between law enforcement officers and probation officers be permitted to make the probation system, a subterfuge for criminal investigations." United States v. Consuelo-Gonzalez, 521 F.2d 259, 267 (9th Cir. 1975), and: ". . . [that] searches conducted . . . by a parole officer can be justified only 'to the extent actually necessitated by the legitimate demands of the operation of the parole process." Velasquez, supra, at 1263, quoting Roman v. State, 570 P.2d 1235 (Ala. 1977).

As the court in Roman v. State, supra, at 242 points out:

> It is only the dual mandate of correctional officers to rehabilitate their clients and to protect society that justifies an intrusion into the privacy of the released offender.

Based on the facts adduced in the trial below, the appellant contends that the prosecutorial parole search conducted by Agent Shepard furthered neither the rehabilitation of his client nor the legitimate protection of society. Agent Shepard went into the residence announcing his intent to search for stolen checks, found the stolen checks and turned them over to the police. Such action can hardly be deemed rehabilitation. Furthermore, the police had the duty to perform a warranted search once they had probable cause to arrest the appellant. Clearly, the police officers in this case could not have searched the appellant's premises without a search warrant: as the court below recognized (R.240), this case did not involve an exception to the rule that "searches conducted [by police] outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment." Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 511, 514, 19 L.Ed.2d 576, 585 (1967).[2] This case should be remanded because John Shepard's

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[2] As this Court noted in State v. Harris, 671 P.2d 175, 179 (Utah 1983), exceptions to the warrantless search rule include consent searches, searches and seizures made in hot pursuit, searches and seizures of contraband in areas lawfully accessible to the public, seizure of evidence in plain view after lawful intrusion, and searches and seizures incident to lawful arrest based on probable cause under exigent circumstances. The present case does not involve any of these "jealously drawn" exceptions.

conduct amounted to circumvention of the requirement that police act pursuant to a warrant. This is especially true given that the court in Velasquez, supra at 1260 noted:

> We do not address the problem of whether a warrant must be obtained when a parolee is living with others who are not parolees. Caution would certainly suggest that a warrant be obtained if the rights of non-parolees might be affected.

In Smith v. Rhay, 419 F.2d 160 (9th Cir. 1969), it was held that a parole officer may not constitutionally conduct a warrantless search of items in a parolee's possession while acting on the prior request of law enforcement officials and in concert with them. In Rhay, upon being informed by the sheriff that a burglary had occurred in the shop in which the parolee's wife worked, the parole officer accompanied a deputy sheriff to find the parolee. The parolee was apprehended in a restaurant and the trio went to the parolee's hotel room, where in plain sight the officers saw a major portion of the items taken from the shop. The parolee was convicted of burglary and sought habeas corpus relief, which was denied by the Federal District Court, and the parolee appealed. Finding that the parole officer was acting as an agent of the police, and deciding that the items had been unconstitutionally seized and should not have been admitted into evidence, the court reversed. The court said that where the parole officer was acting on the prior request of law enforcement officials and in concert with them, he was not acting as the supervising guardian, so to speak, of the parolee, but

as the agent of the very authority upon whom the requirement for a search warrant is constitutionally imposed, and that to permit concerted effort among officials in an attempt, such as was manifest in the present case, to circumvent the parolee's Fourth Amendment rights could not be done.

The appellant in the present case contends that, just as in Rhay, his parole officer and the police acted in concert to circumvent the requirement that the police obtain a warrant to search a parolee's residence. While the record below does not explicitly indicate that the police requested Agent Shepard to conduct a search, the manner in which the search was arranged and conducted readily gives rise to the inference that such a request was made. But even if no request was made, the appellant would urge this court to send a message to overly compliant, even if well-meaning, parole officers that they must stay out of the business of conducting searches in order to supply the police with evidence of crimes. Because the appellant's parole officer was not acting within his prescribed "supervisory" role when he searched the appellant's residence, the court below should have excluded the evidence obtained during the search.

POINT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO EXCLUDE CUMULATIVE OTHER CRIMES EVIDENCE.

This appeal is from the conviction of burglary of the Four Square Church and forgery of a Four Square Church check. Prior to trial, the appellant made a motion to sever the one count

of forgery (and one count of burglary) involving the Four Square Church checking account from the seven counts of forgery involving the checking account of Cary Montoya (R.10) (Addendum A). The trial court granted this motion (R.10) (Addendum B). One day before trial began, defense counsel made a motion, under Rule 404(b) of the Utah Rules of Evidence (1983), to exclude from trial the proposed testimony of Nora Welch (see p. 4 supra)(R.25). Ms. Welch's proffer was that the appellant presented himself as Cary Montoya and cashed a check on the account of Cary Montoya in a local supermarket on February 2, 1985 (the same day that the appellant allegedly cashed the Four Square Church check using the name Cary or Gary Montoya). The trial court denied the appellant's motion to exclude this testimony, ruling that it fell within the "identity" exception to Rule 404(b) (R.164). In so ruling the court committed reversible error.

Nora Welch's testimony plainly constitutes other crimes evidence within the context of the Four Square Church trial. The appellant contends that the court's admission of this other crimes evidence was seriously prejudicial since the evidence was not probative of a material issue, but was merely cumulative. Furthermore, by allowing the evidence into trial the court effectively nullified its ruling granting the appellant's requested severance of the forgery counts.

Rule 404(b), Utah Rules of Evidence (1983) states:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a

> person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Interpreting Rule 404(b)'s predecessor, Rule 55, Utah Rules of Evidence (1971), this Court, in State v. Cauble, 563 P.2d 775, 779 (Utah 1977), held:

> The general rule is that in a criminal case evidence which shows or tends to show that the defendant had committed another crime in addition to that for which he is on trial is inadmissible. However, an exception to the rule is that evidence of another crime is admissible when it tends to establish motive; intent; absence of mistake or accident; or to show a common scheme or plan embracing commission of similar crimes so related to each other that the proof of one tends to establish the crime for which the defendant is on trial.

In State v. Forsyth, 641 P.2d 1172, 1176 (Utah 1982) this Court narrowly confined the admissibility of "common scheme" other crimes evidence:

> Evidence is not admitted merely because it shows a common plan, scheme, or manner of operation. Instead, evidence of a common plan, scheme, or manner of operation is admitted where it tends to prove some fact material to the crime charged.

In his concurrence to the Forsyth opinion, Justice Stewart articulated the spirit in which the court should evaluate other crimes evidence:

> The rule excluding evidence of prior misconduct to show the character or

> disposition of a defendant was established not because such evidence was irrelevant, but because of the likelihood that it would skew the fact-finding process . . . Referring to the federal counterpart to Rule 55, 10 Moore Federal Practice, §404.-21[2] (2nd. Ed. 1981) states: "Admission of other crimes evidence is not guaranteed under Rule 404(b) even if it is offered for 'other purposes. . .'. The danger of undue prejudice must be balanced against the probative value of the evidence in making this determination." (Emphasis added.)

Id. at 1178.

Most recently, in State v. Holder, 694 P.2d 583 (Utah 1984), this Court applied the Forsyth "identity" standard and utilized Justice Stewart's proposed balancing approach to find that evidence indicating the defendant committed a robbery while in possession of a stolen car would not be admissible on the issue of whether in fact the defendant did have possession of the car since the issue of identity of the car thief was foreclosed by other competent evidence. Admission of the robbery evidence would have been merely cumulative and therefore unduly prejudicial.

The appellant contends that the Holder test of admissibility readily applies in the present case to indicate that the testimony of Nora Welch should have been excluded from the trial below. Because State's witness Lynn Cevering (see p.3 supra) was able to say he was "70 percent" certain that the appellant was the individual who had cashed the Four Square Church check, the effect of Nora Welch's testimony was merely cumulate rather

than probative on the issue of identity. If Mr. Cevering had not been able to identify the appellant with any degree of certainty then Ms. Welch's testimony would possibly have been admissible: her testimony increased in probative value in proportion to Mr. Cevering's uncertainty. But because Mr. Cevering's testimony was substantially probative on the issue of identity, the State's case, as in the Holder case, could not be furthered in this essentially "foreclosed" issue by the dangerously prejudicial other crimes testimony of Ms. Welch. Applying the balancing test urged by Justice Stewart, the danger of undue prejudice in this case outweighed the probative value of the State's other crimes evidence. Because the probative value of Ms. Welch's testimony was far outweighed by its threat of prejudice, the jury below was permitted to consider statements indicating nothing other than the appellant's propensity to commit crime.

Even if Ms. Welch's testimony was more probative than prejudicial, still her testimony should have been excluded by virtue of the court's severance of the forgery counts. Presumably, at the time the trial court granted the appellant's motion to sever the various counts of forgery arising from two separate criminal episodes, it did so because one trial on all offenses would have denied the appellant due process of law. This is especially true given that the court below found the methods of forging the Four Square Church and Cary Montoya checks were so similar as to constitute a "common scheme" (R.164). A decision to sever counts on an information where those counts evidence

a "common scheme" is not one made lightly by Utah trial judges. Furthermore, the Utah Supreme Court will overturn a trial judge's failure to sever only upon a substantial showing of prejudicial harm. State v. Peterson, 681 P.2d 1210, 1214 (Utah 1984).

The policies furthered by granting severance of counts are nearly identical to those advanced when the court excludes other crimes evidence. Recognizing judicial economy as the advantage of joinder of offenses, the Distridt of Columbia Court of Appeals, in Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964) noted four disadvantages of joinder: (1) the defendant could become embarrassed or have difficulty in presenting defenses; (2) the jury may infer a criminal disposition and thereby prejudice the defendant; (3) the jury may view the evidence cumulatively; and (4) a prejudicial latent feeling of nostility may surface. Given these reasons for severing counts in an information, it is the appellant's contention that severance is useless if evidence specifically pertaining to separate and severed criminal acts will be mutually admissible in tne separate trials. The due process rights the court protects with one hand it eradicates with the other. Therefore, the court below committed a prejudicial about-face by inconsistently ruling that severance would be granted while the 404(b) motion would be denied. For this reason and because Ms. Welch's testimony constituted cumulative, substantially prejudicial other crimes evidence, the appellant should be granted a new trial.

POINT III

THE TRIAL COURT ERRED BY GIVING THE JURY AN INSTRUCTION WHICH CONTAINED A MANDATORY REBUTTABLE PRESUMPTION.

On the last day of trial, defense counsel took exception to the court's proposed "possession of property recently stolen" instruction (T.124). Despite this objection the court included in its jury instructions:

> INSTRUCTION NO. 13
>
> A related statute provides that:
>
> "Possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be prima facie evidence that the person in possession stole the property."
>
> Thus, if you find from the evidence and beyond a reasonable doubt, (I) that a defendant was in possession of property, (II) that the property was stolen in a burglary, (III) that such possession was not too remote in point of time from the burglary, and (IV) that a defendant had made no satisfactory explanation of such possession, then you may find from those facts that such defendant committed the burglary in which such property was stolen, and stole the property.

The appellant contends that the lower court committed reversible error by giving the above instruction because it unconstitutionally relieved the State of its burden of proof and improperly shifted a burden of proving innocence onto the defendant.

This Court's recent holdings in State v. Chambers, 709 P.2d 321 (Utah 1985) and State v. Pacheco, 20 Utah Adv. Rep. 18

(Utah 1985) are dispositive of the present case and should lead this Court to grant the appellant a new trial.

In Chambers, this Court stated:

> In this case the trial court instructed the jury that possession of recently stolen property, in the absence of a satisfactory explanation, is "prima facie" evidence of theft by the person in possession of the property. Such an instruction. . . fits within the Franklin definition of a mandatory rebuttable presumption: "A "[mandatory] rebuttable presumption. . . requires the jury to find the element unless the defendant persuades the jury that such a finding is unwarranted." 105 S.Ct. at 1971, n.2.
>
> We therefore hold that the instruction given in this case was unconstitutional.

State v. Chambers, supra at 16 (followed in State v. Pacheco, supra at 19).

In so ruling, this Court implicity found that giving the instruction in question resulted in circumvention of the rule, established in In re Winship, 397 U.S. 358, 364 25 L.Ed. 2d 368, 374, 90 S.Ct. 1068, 1074 (1970), that the due process clause requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime. . . charged." The rationale underlying the Chambers ruling was also partly gleaned from this Court's reading of Sandstrom v. Montana, 442 U.S. 510 61 L.Ed. 2d 39, 99 S.Ct. 2450 (1979), (where the Court ruled on the constitutionality of an instruction which read: "[T]he law presumes that a person intends the reasonable and ordinary consequences of his own acts."):

> In Sandstrom, the Supreme Court reasoned that the jury could have interpreted the presumption as irrebuttable or alternatively as requiring a high level of proof in order to rebut the presumption, thereby "effecitvely shifting the burden of persuasion. . . ".

State v. Chambers, supra at 16.

The Chambers ruling relied most directly upon the recent United States Supreme Court case of Francis v. Franklin, 105 S.Ct. 1965, 85 L.Ed. 2d 344 (1985):

> Franklin extended the Sandstrom decision and found that use of any mandatory rebuttable presumption in a jury instruction is unconstitutional.
>
> A mandatory rebuttable presumption . . . relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding. A mandatory rebuttable assumption is perhaps less onerous [than an irrebuttable or conclusive presumption] from the defendant's perspective, but is no less unconstitutional.

Chambers, supra at 16 quoting Franklin, supra at 1972-1973.

The appellant in the present case contends that a mandatory rebuttable presumption arose when the trial court read instruction 13 quoted above. Because this case involves an instruction identical to the one found objectionable in Chambers, this Court should grant the appellant a new trial.

It should be noted that the language in instruction 13 which follows the quotation of Utah Code Ann. §76-6-402(1) does

not cure the defect which arose from reading the statute. As this Court stated in Chambers, supra, at 16-17:

> Although there was another instruction given, instruction No. 25, which restated the presumption in permissive form, the additional instruction failed to cure the defect. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." (Citation omitted.) Thus, because the mandatory presumption in question directly related to the determination of defendant's guilt, we hold that defendants are entitled to a new trial.

It should also be noted that the non-statutory language in instruction 13 informs the jury that the appellant could be presumed guilty where the "defendant had made no satisfactory explanation" of his possession of stolen property. This language suffers from the very infirmity which lies at the heart of the objectionable stautory language. The appellant should be granted a new trial because "[a]n instruction which could reasonably be understood to relieve the State of its burden of proof is constitutionally defective." Chambers, supra at 17.

CONCLUSION

The court below erred in failing to grant the defendant's motion to suppress evidence obtained during the improper parole search of the defendant's residence. The court committed further serious error when it ruled that merely cumulative, other crimes

evidence pertaining to forgery counts severed from the trial below could be admitted at trial. Eclipsing the prejudice caused by these two rulings, the court committed fundamental error when it insisted upon reading the jury an unconstitutional "possession of property recently stolen" instruction. Because of the highly prejudicial nature of the errors committed below, the appellant requests that his conviction be reversed and that his case be remanded for a new trial.

Respectfully submitted this _____ day of January, 1986.

FRANCES M. PALACIOS
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Frances M. Palacios, hereby certify that four copies of the foregoing Appellant's Brief will be deliverd to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this _____ day of of January, 1986.

FRANCES M. PALACIOS
Attorney for Appellant

DELIVERED by _____ this _____ day of January, 1986.

ADDENDUM A

THIRD JUDICIAL DISTRICT
County of Salt Lake - State of Utah

CR85 388

FILE NO: CR85-389

TITLE:	(✓ Parties Present)	COUNSEL:	(✓ Counsel Present)
State of Utah		J Gunnell ✓	
vs.			
Patrick D. Johnson ✓		K. Jennings UP	
DOB 12-6-45		D. Biggs ✓	
D Ricks	Clerk	HON: Judith M. Billings	Judge
E Ambrose	Reporter		
L. Brady	Bailiff	DATE: 26 April 1985	

☐ Based upon motion of _____ counsel for the _____, the court hereby orders the _____ continued to _____ for the reason of _____.

☐ Based on Court's motion, the Court hereby orders the trial reset to _____, for the reason of _____.

☐ The above named defendant having been granted a stay of execution of sentence to this date. Now on the court's own motion and good cause appearing therefor, it is ordered that said defendant be granted a further stay of execution of sentence to _____

☐ The above named defendant having been granted a stay of execution of sentence to this date. Now on the court's own motion and good cause appearing therefor, it is ordered that the probation of said defendant is terminated and he is released from supervision.

☐ Based on non-appearance of the defendant _____ and on ☐ motion of the County Attorney or ☐ Court's own motion, it is ordered that a bench warrant issue for said deft. returnable forthwith ☐ No Bail ☐ Bail $_____.

☐ Based upon motion of counsel for the State and good cause appearing therefor, it is ordered that the above entitled case be and same is dismissed for the reason of _____

☐ Based upon entry of defendant's plea in case no: _____ and on motion of counsel for the State, it is ordered that the above entitled case be and same is dismissed.

☐ APPD Notified ☐ Called _____ at APPD

☐ Placed copy of M. E. in APPD Box

☐ APPD Agent _____ Present

Based on oral Stipulation of Counsel, Court orders Ct 1 Forgery 2° Felony be severed from CR85-389 & joined w/ CR85-388. Trial dates will be Set & affirmed Monday 29 April 1985.

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KAREN JENNINGS (#1660)
Attorney for Defendant
Salt Lake Legal Defender Assoc.
333 South Second East
Salt Lake City, Utah 84111
Telephone: 532-5444

Christine Ricks

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	MOTION TO SUPPRESS
Plaintiff	:	
-v-	:	
PATRICK JOHNSON,	:	Case No. CR85-388 CR85-389
Defendant	:	

The defendant through his counsel, KAREN JENNINGS, hereby moves to suppress at trial items taken from the house in which he was arrested on February 14, 1985 because:

1. They were seized in violation of his right against unreasonable searches and seizure.

2. Counsel for the defendant was notified of the existence of such items on May 6, 1985 and has tried without success to get copies of said items for investigation purposes. The County Attorney was on May 6th, aware that counsel for the defendant had a vacation scheduled for May 9-17, 1985 and still has failed and refused to make copies of said items. A Discovery Order was signed by this court on April 26, 1985.

DATED this 8th day of May, 1985.

Respectfully submitted,

Karen Jennings

KAREN JENNINGS
Attorney for Defendant

FRANCES M. PALACIOS (#2502)
Attorney for Defendant
Salt Lake Legal Defender Association
333 South Second East
Salt Lake City, Utah 84111
Telephone: 532-5444

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	MOTION TO EXCLUDE
Plaintiff	:	
vs.	:	
PATRICK D. JOHNSON,	:	Case Nos. CR 85-388 and CR 85-389
Defendant	:	(Judge Billings)

The defendant, PATRICK D. JOHNSON, by and through his attorney, FRANCES M. PALACIOS, hereby moves this Court in the above-entitled action to exclude all evidence of crimes, wrongs, or acts pursuant to 404(b), Utah Rules of Evidence.

DATED this 21 day of May, 1985.

FRANCES M. PALACIOS
Attorney for Defendant

DELIVERED a copy of the foregoing Motion to the Jimmy Gurule, Deputy County Attorney, 231 East Fourth South, Salt Lake City, Utah 84111, this 21 day of May, 1985.

Lorene Lemmon

FRANCES M. PALACIOS
Attorney for Defendant
Salt Lake Legal Defender Association
333 South Second East
Salt Lake City, Utah 84111
Telephone: 532-5444

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	DEFENDANT'S APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE
Plaintiff	:	AND MOTION FOR STAY OF FURTHER IMPOSITION OF SENTENCE PENDING
vs.	:	APPEAL
PATRICK D. JOHNSON,	:	Case No. CR 85-388 (Judge Billings)
Defendant	:	

Defendant, PATRICK D. JOHNSON, by and through his attorney of record, hereby applies for a Certificate of Probable Cause pursuant to Section 77-35-27, Rule 27, Utah Rules of Criminal Procedure. Defendant bases this Application for Probable Cause on the following meritorious issues arising from his trial and subsequent conviction in case number CR 85-388.

1. The trial court should have granted defendant's motion to suppress on the grounds that the search was not within the delineated purpose and policy of a parole search.

2. The trial court should have granted defendant's motion to exclude the alleged specific bad act of defendant pursuant to Rule 404b, Utah Rules of Evidence.

ADDENDUM B

County of Salt Lake - State of Utah

FILE NO CR85-388, CR85-389

TITLE: (✓ PARTIES PRESENT)	COUNSEL: (✓ COUNSEL PRESENT)
State	J Gurule ✓
VS	
Patrick Johnson ✓	J Palacios ✓
Jail	K Jennings ✓

C. Porter — CLERK
E. Ambrose — REPORTER
L Brady — BAILIFF

HON Judith M Billings — JUDGE
DATE. May 23, 1985

Connie Morishita is sworn and examined on behalf of defendant. The Court now being fully advised, denies defendants motion to suppress. After having the Court Reporter read the notes from the April 29, 1985 hearing, the Court denies defendants motion to deny

Mr Gurule to prepare findings of fact and order.

Comes now Counsel for defendant and makes a motion that a letter written by defendant be excluded as admissable evidence in the trial because it was not received by defendants Counsel until after an order was signed by Judge Fishler on May 9, 1985 The Court denies defendants motion.

Counsel for defendant Makes another motion to exclude evidence under rule 404 B. The Court Continues the motion to May 28, 1985 at 11.00 a.m.

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County of Salt Lake - State of Utah

FILE NO. CR85-388

TITLE: (✓ PARTIES PRESENT)	COUNSEL: (✓ COUNSEL PRESENT)
State of Utah	R. Stott ✓
vs	
Patrick D. Johnson (USP) ✓	F. Palacios ✓
DoB 12-6-45	

D. Drysdale — CLERK
E. Ambrose — REPORTER
L. Brady — BAILIFF

HON. Judith M. Billings — JUDGE
DATE: 26 July 1985

This Case comes now on regularly before the Court for defts application for Certificate of Probable Cause & Motion for Stay of further imposition of Sentence pending appeal. Based on oral argument of respective Counsel Court denies the above Motions. State to prepare order

T. L. "TED" CANNON
Salt Lake County Attorney
JIMMY GURULE'
Deputy County Attorney
231 East 400 South, Suite 300
Salt Lake City, UT 84111
Telephone: (801)363-7900

STP 4

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW,
Plaintiff,	)	AND ORDER DENYING DEFENDANT'S MOTION
vs	)	TO SUPPRESS EVIDENCE
PATRICK D. JOHNSON,	)	Case No. CR 85-388
Defendant.	)	Honorable Judith Billings

On May 23, 1985, the Defendant's Motion to Suppress Evidence found at the defendant's residence as the result of a parole search came before the Court for hearing, the Honorable Judith M. Billings presiding. The State of Utah was represented by Jimmy Gurule', Deputy County Attorney, and the defendant was represented by Counsel, Frances Palacios. Testimony was given and oral arguments were heard by the Court. Being fully advised of the legal questions at issue; having considered the proposed evidence; authorities of counsel and arguments of counsel, the Court now enters its:

FINDINGS OF FACT

(1) John Shepherd, an Agent with Utah State Adult Probation and Parole, testified that on February 2, 1985, the defendant, PATRICK D. JOHNSON, was on parole for the commission of a burglary, a third-degree felony.

(2) John Shepherd further testififed that on February 2, 1985, he spoke with Detective Kyle Jones, Salt Lake City Police Department, who stated that a formal information had been filed with the Court charging the defendant with eight felony counts of Forgery.

(3) Detective Jones stated that one of the forged checks was taken during a burglary of the Four Square Church. The other forged checks were made out on the checking account of "Cary Montoya".

(4) On February 2, 1985, John Shepherd accompanied Detective Jones to the defendant's residence for the purpose of conducting a parole search in an attempt to locate property and/or checks taken during the Four Square Church burglary as well as other checks belonging to Cary Montoya.

(5) During the search of the defendant's residence Agent John Shepherd located a blank check on the account of Four Square Church and numerous papers and receipts containing the name and/or signature of "Cary Montoya".

The Court having entered its Findings of Fact, the Court now enters its:

CONCLUSIONS OF LAW

(1) That pursuant to Rule 401 and 402 of the Utah Rules of Evidence, the Four Square Church check and the papers and receipts containing the name and/or signature of Cary Montoya are probative on the issue of the identity of the perpetrator of the burglary and the forgeries charged in the instant case.

(2) As set forth in State v Velasquez, __ P2d __ (Utah 1983), Agent John Shepherd had "reasonable suspicion" to conduct a parole search of the defendant's

residence. Agent Shepherd had "reasonable suspicion" to believe the defendant had committed a parole violation or other crime and further that contraband would be located in his residence. The search was therefore reasonable and not in violation of the Fourth Amendment of the United States Constitution or Article I, Section 14, of the Utah Constitution.

The Court having entered its Conclusions of Law, the Court now enters its:

ORDER

The DEFENDANT'S MOTION TO SUPPRESS EVIDENCE IS DENIED.

DATED this 4 day of ~~AUGUST~~ Sept, 1985.

JUDITH M. BILLINGS
Third District Court Judge

ATTEST
H. DIXON HINDLEY
Clerk
By [illegible] Deputy Clerk

Approved as to form:

FRANCES PALACIOS
Counsel for Defendant